

# DICTA

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PRESIDENT TRUMP GOES  
FULL SPEED AHEAD WITH  
HIS IMMIGRATION AGENDA**





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# MAJOR CHANGES TO APPELLATE RULES

On July 1, 2017, the Tennessee Rules of Appellate Procedure will undergo two fundamental changes that affect both civil and criminal appeals. First, the location for initiating an appeal will change. Second, the appellant will be responsible for paying a filing fee with the clerk of the appellate court rather than posting a bond for costs. For any Tennessee lawyer whose practice includes appellate work, it is important to understand and be prepared for these changes.

In addition to the rules of civil procedure and criminal procedure which govern practice in Tennessee trial courts, the Supreme Court has adopted detailed rules of procedure to govern appeals from adverse decisions of trial courts and from intermediate appellate courts. The Tennessee Rules of Appellate Procedure delineate the process for prosecuting and defending appeals, whether the appeal is an appeal as of right or an appeal by permission, in the Court of Appeals, the Court of Criminal Appeals, and the Supreme Court.<sup>1</sup> Probably, the two most important rules are Tenn. R. App. P. 3 and Tenn. R. App. P. 4, for these rules describe the basic process for initiating the appeal and the time for filing the notice of appeal. Rule 3 states that an appeal is initiated by the timely filing of a Notice of Appeal, and Rule 4 states that the Notice of Appeal must be filed “within 30 days after the date of entry of the judgment appealed from. . . .” In *civil* cases, this thirty-day time limit is jurisdictional.<sup>2</sup> In other words, a party who loses a civil case and whose lawyer fails to file either a notice of appeal or a specified post-trial motion<sup>3</sup> within 30 days of the entry of judgment will be barred from appealing the decision regardless of merit.<sup>4</sup> Therefore, it is of the utmost importance that counsel for an appellant file a *timely notice* with the proper court clerk.

For many years, the location for filing the Notice of Appeal has been the clerk of the trial court. Tenn. R. App. P. 4(a). However, by order dated December 21, 2016, the Tennessee Supreme Court has amended the appellate rules to provide that, starting on July 1, 2017, the Notice of Appeal will be filed *with the clerk of the appellate court*. The time period for filing a Notice of Appeal remains the same – 30 days after the date of the entry of the judgment appealed from. However, the *location* has changed from the office of the trial court clerk to the office of the appellate court clerk.

Since the Court of Appeals and Court of Criminal Appeals are located in downtown Knoxville, this change should not be disruptive to Knoxville lawyers. In fact, to the extent that an appeal is from the decision of a trial court in a county other than Knox County, the amendment will minimize the panic of a last-minute dash to the courthouse. Furthermore, since the appellate courts are supposed to begin accepting electronic filings in 2017, the impact on lawyers whose offices are in outlying counties should be minimal.

For those practitioners who have done appellate work for years, just hearing of this change may cause the anxiety that is all-too-common for trial lawyers: *What if I forget and file in the wrong place on the last day?* Not to worry. As a sop to those of us whose clients do not authorize an appeal until the last minute, the Supreme Court has added a “transitional provision” to Tenn. R. App. P. 4. Under this provision, a party whose lawyer erroneously files a Notice of Appeal with a trial court clerk within the mandatory filing period will have an additional twenty days to perfect the appeal by filing in the appropriate appellate court. After July 1, 2017, the clerks of all trial courts in the State are directed to “note the date and time of receipt of the attempted filing and immediately notify the party attempting to file the notice of appeal that the notice must be filed with the appellate court clerk.” Tenn. R. App. P. 4(a). Armed with this notification, the appellant “shall have 20 additional days. . . within which to file the notice of appeal with the appellate court clerk. . . [and] such notice “shall be deemed to have been timely filed.” *Id.*

It is worth noting, however, that this transitional period does come to an end. At 11:59 p.m. on June 29, 2018, the transitional period terminates. Thereafter, only timely filings in the Court of Appeals, the Court of Criminal Appeals, or the Supreme Court will be effective. Tenn. R. App. P. 4(a).

The other fundamental change in the Tennessee Rules of Appellate Procedure involves the handling of costs associated with the appeal. At least since 1848, a party desiring to appeal a civil case has not paid a filing fee but has posted a bond in the trial court for the court costs generated by the appeal.<sup>5</sup> Tenn. R. App. P. 6 (a). Typically, this has simply involved the appellant signing the cost bond as principal and his or her lawyer signing the bond as surety.<sup>6</sup> That process will be a thing of the past when the changes to the appellate rules become effective on July 1, 2017.

When the changes to the appellate rules take effect on July 1, a party who files an appeal will no longer post a bond for the costs on appeal. Rather, an appellant will have to pay a filing fee with the clerk of the appropriate appellate court. As amended, Tenn. R. App. P. 6 provides:

Contemporaneous with the filing of appellant’s notice of appeal or other initiating document, appellant shall (1) pay all applicable litigation taxes and all applicable fees required by the clerk of the appellate court, (2) establish to the satisfaction of the clerk of the appellate court the basis for an exemption or (3) apply for, or establish proof of, indigency in accordance with Rule 18.

Failure to pay the fee or to establish either an exemption or indigency will result in the issuance of an order to show cause why the appeal should not be dismissed. *Id.*

While these two changes are the most significant amendments to the Tennessee Rules of Appellate Procedure, the Supreme Court’s order includes other changes which will affect appellate practice. Attorneys who handle civil or criminal appeals are encouraged to review the Supreme Court’s order carefully.<sup>7</sup>

<sup>1</sup> Tenn.R.App.Pro. 1.

<sup>2</sup> *Hutcheson v. Barth*, 178 S.W.3d 731, 733 (Tenn. Ct. App., 2005), per. app. den., 2005. In criminal cases, the notice of appeal is not jurisdictional, and “the timely filing of such document may be waived in the interest of justice.” Tenn. R. App. P. 4(a). *State v. Scales*, 767 S.W.2d 157, 158 (Tenn. 1989). It is up to the appellate court to determine if waiver is “in the interest of justice.” Tenn. R. App. P. 4(a). See, e.g., *State v. Rockwell*, 280 S.W.3d 212, 214 (Tenn. Crim. App. 2007).

<sup>3</sup> Pursuant to Tenn. R. App. P. 4(b), the filing of a specified motion in the *trial court* alters the time for filing a notice of appeal. *Binkley v. Medling*, 117 S.W.3d 252, 255 (Tenn. 2003). In particular, a party that files a motion under Tenn. R. Civ. Pro. 50.02, 52.02, 59.07 or 59.04 has 30 days from the granting or denying of the motion to file the Notice of Appeal. *Id.* Similarly, Tenn. R. App. P. 4(c) tolls the time for filing a Notice of Appeal in a criminal case where a party files a specified motion in the *trial court*. As in civil cases, the time to file a Notice of Appeal is 30 days from the granting or denying of the motion.

<sup>4</sup> Of course, there are certain provisions in the Rules of Civil Procedure which provide a mechanism to relieve a party from a final judgment or order in extraordinary circumstances. See Tenn. R. Civ. Pro. 60.

<sup>5</sup> *Davis for the Use of Trotter v. Hansard*, 28 Tenn. 173 (1848) (dismissing appeal for failure of appellant to file bond for costs on appeal).

<sup>6</sup> *Coleman v. Humane Society of Memphis*, 2014 WL 587010 at \* 31, fn 24 (Tenn. Ct. App. 2014). Under Tenn. R. App. P. 6, the appellate court clerk has the authority to require proof that the surety has sufficient assets in the State of Tennessee to pay the costs of the appeal. In fact, the clerk may reject the proposed bond upon a finding that the surety’s assets are insufficient.

<sup>7</sup> A complete copy of the Supreme Court’s Order of December 21, 2016, may be found at: [https://www.tncourts.gov/sites/default/files/tn\\_rules\\_of\\_appellate\\_procedure\\_-\\_amendment\\_order\\_12-21-2016.pdf](https://www.tncourts.gov/sites/default/files/tn_rules_of_appellate_procedure_-_amendment_order_12-21-2016.pdf).